DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

BRUCE E. BABBITT
ATTORNEY GENERAL

February 14, 1978

Honorable Morris Farr
Arizona State Senator
Senate Wing - State Capitol
Phoenix, Arizona 85007

Re: 78- 29 (R77-228)

Dear Senator Farr:

This is in response to your request for an opinion from this office as to 1) what differentiates an underground stream from percolating water, and 2) what constitutes a well tapping appropriable waters. As discussed below, the answer to your second question depends upon whether the water supply being tapped is "appropriable" or whether it is within the definition of "groundwater."*

Even if a specific fact situation and hydrologic data were available, it would be extremely difficult for this office to answer this inquiry definitively by an opinion. The best we can hope to accomplish here is a restatement of the general principles set forth by the courts in response to particular conflicts and fact situations.

The real issue is whether a surface user of subterranean water can ever acquire certain rights to that water under the appropriation statutes, or whether the water is classified as groundwater and therefore subject to the groundwater code and the doctrine of reasonable use, as defined by the courts.

As your question suggests, there is a built-in conflict in the Arizona statutes concerning subsurface water. On the one

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* The terms "percolating" and "groundwater" will be used interchangeably since they mean the same thing under Arizona law.

hand, the Legislature has defined groundwater in A.R.S. § 45-301, as amended, as:

> . . . water under the surface of the earth regardless of the geologic structure in which it is standing or moving. It does not include water flowing in underground streams with ascertainable beds and banks.

At the same time all surface waters are considered "public waters" and therefore subject to appropriation under the statutory provisions first adopted in 1919. See § 45-101, et seq. The definition of public waters, however, also includes underground streams with ascertainable beds and banks. A.R.S. § 45-101(A) states:

> A. The waters of all sources, flowing in streams, canyons, ravines, or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.

The most recent legislative definition appears in the Water Rights Registration Act, A.R.S. § 45-180(3), which states:

> 3. "Public waters" or "water" means waters of all sources flowing in streams, canyons, ravines or other natural channels or in definite underground channels, whether perennial or intermittent flood, waste or surplus water, and of lakes, ponds and springs on the surface.

This dichotomy of treatment for subsurface waters has not only created considerable uncertainty and confusion, but is thought by many observers to be of limited -- if any -- hydrological validity. See, Clark, "Arizona Ground Water Law: The Need for Legislation", 16 Ariz.L.Rev. 799, 800-801 (1974); J. Chalmers, Southwestern Ground Water Law, p. 4 (1974).

While the legal distinction may be only an academic one, the Arizona Supreme Court has on at least one occasion agreed that subsurface water was being drawn from an underground stream and could be "appropriated." In Pima Farms v. Proctor, 30 Ariz. 96, 245 P. 369 (1926), the court accepted the contention by both parties that the water was part of a known underground stream -- the subflow of the Santa Cruz River in Pima County -- and thus appropriable. The facts there involved wells sunk on land along the Santa Cruz to develop some 15,000 acres for agriculture. Under the facts of that case, the court applied the appropriation doctrine to cover an underground water supply over a mile in width and to an acquifer apparently with undefined banks and channels. The case, however, has never been subsequently approved or extended and is perhaps distinguishable by the fact that the parties were not in disagreement on the character of the water or the legal theory to be applied. Thus, in a unique case in Arizona water law, the court applied the doctrine of appropriation to subsurface water to protect vested rights by virtue of prior wells.

Soon after Proctor, however, the issue of the nature of subsurface water was squarely addressed by the Supreme Court in Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931). The court there established the rule that subsurface waters will be presumed to be "percolating" waters and that a party seeking to prove the existence of an underground stream with definite banks has the burden to do so by clear nad convincing evidence. The court there set forth what would be required to meet this burden of proof:

> " . . .But all of these [types of evidence], when examined, must be such as to affort clear and convincing proof to the satisfaction of a reasonable man, not only that there are subterranean waters, but that such waters have a definite bed, banks and current within the ordinary meaning of the terms as above set forth, and the evidence must establish with reasonable certainty the location of such beds and banks. It is not sufficient that geologic theory or even visible physical facts prove that a stream may exist in a certain place, or probably or certainly does exist somewhere. There must be certainty of location as well as of existence of the stream

> before it is subject to appropriation. . ." Maricopa County Mun. Water Cons. Dist. No. 1 v. Southwest Cotton Co., supra, at 87. [Emphasis original]

The Court proceeded to reject the notion that subsurface water lying in a continuous basin in river valleys was appropriable -- at least with regard to the Hassayampa, Gila, Salt, Verde and Agua Fria Rivers. Regarding these waterladen valleys, the court observed:

> Since the detritus with which the valley is filled is coarser in some places than in others, the tendency of the water is to accumulate in greater quantity where the material is coarse than where it is fine, and to move more rapidly therein, and these bodies of coarse material, with finer bodies of coarse material, with finer presumably above, beneath, and beside them, are what are called by plaintiffs subterranean watercourses.
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> But, in admitting this theory to be absolutely correct in its deductions, there is not a scintilla of evidence in the record from which the ordinary man, or even the trained scientist, could point out definitely a specific place where any one of these so-called subterranean watercourses begins, where it ends, or how far its banks extend . . . . Maricopa County Mun. Water Dist. No. 1 v. Southwest Cotton Co., supra, at 89-90.

The principle there established has been subsequently reiterated in England v. Ally Ong Hing, 8 Ariz. App. 374, 378, 446 P. 2d 480 (1968), vacated on other grounds, 105 Ariz. 65, 495, P. 2d 498 (1969); and in Neal v. Hunt, 112 Ariz. 307, 311, 541 P. 2d 559 (1975).

In sum, while it may not be impossible to prove that a well is tapping a definite underground stream, there is a heavy burden on a party to so establish by convincing hydrological evidence that this is the case.

This uncertainty does indeed create problems for those seeking to protect water rights for wells by registering claims

under the Water Rights Registration Act. A.R.S. § 45-180, et seq.* If application is made on the basis that the well taps an underground stream, it will be up to the Land Department initially to determine, utilizing the test established by the courts, if the water is appropriable. This determination is subject to judicial review under A.R.S. § 37-134.

Although the 1926 Proctor decision has not been overruled, more recent cases cast a great deal of doubt on the vitality of that case. The most that can be said at this point is that a well could tap an underground stream as defined by statute and thus be appropriable. Any claimant filing an application claiming vested rights to appropriate such water under the Water Rights Registration Act has the burden of so convincing the Land Department by clear and convincing hydrologic evidence.

If you have any further questions concerning this matter, please let me know.

Very truly yours,

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* The Water Rights Registration Act requires that all claims to rights to "public waters" not covered by a permit or certificate, court decree or adjudication be filed with the State Land Department by June 30, 1978 or they will be deemed relinquished.